79-608

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

THE STATE OF TEXAS,

Petitioner

V.

DONALD GENE MIXON
AND
WELDON C. DIXON,

Respondents

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

* * *

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

* * *

The Petitioner State of Texas respectfully prays that a writ of certiorari issue to review the judgments of the Texas Court of Criminal Appeals entered in these proceedings[1] on July 18, 1979.

OPINIONS BELOW

The opinions of the Texas Court of Criminal Appeals are *Ex parte Mixon*, 583 S.W.2d 378 (Tex.Crim.App. 1979) (en banc) and *Ex parte Dixon*, 583 S.W.2d 793 (Tex.Crim.App. 1979) (en banc). These opinions appear in the Appendix hereto as "A" and "B" respectively.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals in *Ex parte Mixon* was entered on February 28, 1979. A

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[1]The parties are listed together in one caption pursuant to Rule 23(5), Rules of the Supreme Court of the United States.

timely filed motion for rehearing was denied on July 18, 1979.

The judgment of the Texas Court of Criminal Appeals in *Ex parte Dixon* was entered on July 18, 1979.

This petition for writ of certiorari was filed within ninety days after final judgment in each of these cases. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether this Court's decisions in *Burks v. United States*, ___U.S.___, 98 S.Ct. 2141 (1978), and *Greene v. Massey*, ___U.S.___, 98 S.Ct. 2151 (1978), that the Double Jeopardy Clause of the Constitution bars retrial and conviction following an initial appellate reversal for insufficient evidence, should be applied retroactively?

STATUTORY PROVISIONS INVOLVED

Article 44.25, V.A.C.C.P.

The Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts. A cause reversed because the verdict is contrary to the evidence shall be remanded for a new trial.

STATEMENT OF THE CASES

Respondent Donald Gene Mixon was convicted in Deaf Smith County, Texas, in 1972 for theft of grain over fifty dollars. On appeal, the Texas Court of Criminal Appeals held that the evidence was insufficient to support the conviction and, in compliance with Article 44.25, V.A.C.C.P., remanded the cause for a new trial, *Mixon v. State*, 507 S.W.2d 238 (Tex.Crim.App. 1974). In August, 1974, respondent was retried for the same offense, convicted, and received a

sentence of seven years. On appeal, the judgment was affirmed in an unpublished per curiam opinion. *Mixon v. State*, No. 50, 175 (Tex.Crim.App., Sept. 17, 1975). *See* Table, 527 S.W.2d 316. Subsequently, respondent filed a petition for writ of habeas corpus in the state convicting court which recommended the granting of relief on the basis of this Court's holdings in *Burks* and *Greene*. On February 28, 1979, the Texas Court of Criminal Appeals en banc granted habeas corpus relief on the same basis. The State timely filed a motion for rehearing which was overruled by the court en banc with a dissent on July 18, 1979. This petition for writ of certiorari followed.

Respondent Weldon C. Dixon was originally convicted in Hunt County, Texas, for aggravated robbery. On appeal, the conviction was reversed and remanded for insufficient evidence. *Dixon v. State*, 541 S.W.2d 437 (Tex.Crim.App. 1976). Respondent was retried and convicted for the same offense, receiving a sentence of sixteen years. Later he filed a state petition for writ of habeas corpus that was ultimately granted by the Texas Court of Criminal Appeals on July 18, 1979, on the basis of this Court's holdings in *Burks* and *Greene*. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

1. THE TEXAS COURT OF CRIMINAL APPEALS INCORRECTLY HELD FULLY RETROACTIVE THIS COURT'S DECISIONS IN *BURKS V. UNITED STATES* AND *GREENE V. MASSEY*.

2. THE RETROACTIVITY OF *BURKS* AND *GREENE* IS A QUESTION OF NATIONAL IMPORTANCE.

   A. Unless These Cases Are Held To Be Prospective, The Number of Prisoners Who May

ARGUMENT

I. THE TEXAS COURT OF CRIMINAL APPEALS INCORRECTLY HELD FULLY RETROACTIVE THIS COURT'S HOLDINGS IN *BURKS V. UNITED STATES* AND *GREENE V. MASSEY.*

In *Burks v. United States,* ___U.S.___, 98 S.Ct. 2141 (1978), and *Greene v. Massey,* ___U.S.___, 98 S.Ct. 2151 (1978), this Court overruled a long line of its own authorities in order to hold that the Double Jeopardy Clause of the United States Constitution bars retrial of a criminal defendant who has obtained an appellate reversal of his conviction because of insufficiency of the evidence. The Court reasoned that if the evidence were legally insufficient at trial, then theoretically the case should never have been submitted to the jury at all, but instead any defendant who at the close of the State's evidence moved for an instructed acquittal would have been entitled to one.

For this reason, the Court held that all defendants are entitled to the double jeopardy benefits of the State's failure to present sufficient evidence at its initial opportunity. The Court, however, failed to rule explicitly whether its holdings would apply retroactively so as to invalidate the convictions of all defendants who had already been retried and reconvicted in criminal proceedings supported by sufficient evidence and free of any other constitutional

infirmity.[2]

The criteria for determining retroactivity of double jeopardy decisions were set out in *Robinson v. Neil,* 409 U.S. 505 (1973). At issue there was the retroactivity of the double jeopardy holding in *Waller v. Florida,* 397 U.S. 387 (1970).

The Supreme Court noted that the analysis embodied in *Linkletter v. Walker,* 381 U.S. 618 (1965), which is based upon protecting "the very integrity of the fact-finding process,"[3] *id.* at 639, is "not appropriate" in the context of double jeopardy decisions, *Robinson v. Neil* at 509. The Court continued to emphasize, however, the "element of reliance embodied in the *Linkletter* analysis . . . ."

Thus, the Court, cautioning against the view that its rule of decision "is an ironclad one that will invariably result in the easy classification of cases in one category

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[2]It is worth noting that there are numerous reasons why the State during a second prosecution might adduce constitutionally sufficient evidence after failing to do so during the first. Of minor importance is the possibility that the passage of time might produce additional evidence of guilt. More significantly, the State often possesses inculpatory and even damning evidence that it chooses not to introduce because it may be held inadmissible on appeal. The evidence may be a fruit of a search that the State fears will ultimately be held improper, or of a confession that might on appeal be held coerced. The evidence may be of arguable but less than certain admissiblity for many other reasons that may cause the prosecution to seek a conviction without it.

[3]This analysis, as summarized in *Stovall v. Denno,* 388 U.S. 293, 297 (1967) emphasizes the purpose to be served by the new standards, the extent of reliance by lay enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Desist v. United States,* 394 U.S. 244, 249 (1969).

or another,[4] *id.* at 509, established a two-prong good faith reliance and prejudice test. This test focuses first on whether the State's reliance on the prior rule was supported by case law such that the new constitutional decision "marked a departure from past decisions of this [Supreme] Court." *Robinson v. Neil* at 511. If so, the State's reliance upon earlier constitutional decisions, both state and federal, would obviously be in good faith. Second, the Court felt it important to examine the nature and form of the prejudice the State would suffer from retroactive application of the constitutional rule and the extent of the unfairness of such prejudice, compared to the beneficial effect upon the valid interests of defendants in such retroactive application.

Applying this test to the facts before it, the Supreme Court held *Waller v. Florida* retroactive, stating first that "[the] decision in *Waller* cannot be said to have marked a departure from past decisions of this Court." *Robinson v. Neil* at 510. The Court in effect held that the State should have realized that municipalities and states were sufficiently parts of one sovereign such that criminal prosecution by one would bar later criminal prosecution by the other -- the essential holding of *Waller v. Florida.*

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[4]Indeed, in the four most recent double jeopardy-retroactivity cases located by the State, two held a Supreme Court double jeopardy decision to be retroactive, and two refused to do so. In *Holt v. Black*, 550 F.2d 1061 (6th Cir.), *cert. denied*, 432 U.S. 910 (1977), the Court held *Breed v. Jones*, 421 U.S. 519 (1975), retroactive, whereas a contrary conclusion was reached in *Jackson v. Justices of Superior Court of Mass.*, 549 F.2d 215 (1st Cir.), *cert. denied*, 430 U.S. 975 (1977). In *United States v. Rumpf*, 576 F.2d 818 (10th Cir. 1976), *cert. denied*, ___U.S.___, 99 S.Ct. 251 (1978), the decision in *Abney v. United States*, 431 U.S. 651, (1977), was held to be prospective only. Finally, in *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir. 1975), the Fifth Circuit afforded full retroactive status to the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970).

By contrast, the decisions of the Supreme Court in *Burks v. United States* and *Greene v. Massey* marked a significant departure from prior decisions. The Court itself admitted, "The Court's holdings in this area, beginning with *Bryan*, can hardly be characterized as models of consistency and clarity." *Burks v. United States*, ___U.S. at ___, 98 S.Ct. at 2146. The Court further admitted, "To reach a different result [from the Court of Appeals] will require a departure from the [earlier] holdings." *Id.* To settle the matter, the Court stated:

> "[O]ur past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands. A close re-examination of those precedents, however, presuades us that they have not properly construed the Clause, and accordingly, should no longer be followed."

Id. at ___, 2147. Obviously, the law in this area before *Burks* and *Greene* -- especially insofar as whether seeking an appeal constituted a waiver of a criminal defendant's double jeopardy rights -- was on balance contrary to the newly announced constitutional rule.

Texas law for decades has mirrored federal law in this respect. In a long and unbroken line of cases implementing Article 44.25, V.A.C.C.P., and its statutory predecessors, the Texas Court of Criminal Appeals has held that a defendant might be retried for the same offense following a reversal for insufficient evidence.[5] Thus, under *Robinson v. Neil*, good faith reliance by Texas law enforcement authorities is shown.

Clearly, good faith detrimental reliance could well have been a reality in many cases such as respondents',

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[5]After *Burks* and *Greene* the Court of Criminal Appeals held Article 44.25 unconstitutional to the extent of conflict with this Court's decisions. *Johnson v. State*, 571 S.W.2d 4, 6 n.2 (Tex.Crim.App. 1978).

and in two ways. First, for example, if respondents might have been tried upon other charges following their first convictions, but the State in good faith believed that they might also validly be retried upon the same charge for which a reversal of the conviction had been obtained, good faith reliance would be shown. Through no fault of the State, respondents could not now be retried for any of such charges, the applicable statutes of limitations having long ago expired.

Second, there are many reasons why there might have been additional evidence that might have been introduced at respondents' trials, but that was excluded for a variety of reasons. *See* footnote two, *supra*. The State should not be forever deprived of this evidence because of a strategic judgment founded upon a good faith, but erroneous, view of the law.

It should be emphasized that these respondents do not present issues in which doubt has been cast upon the accuracy of the guilty verdict in their second trials. In *Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) [quoted and emphasis added in *Hankerson v. North Carolina*, ___U.S.___, 97 S.Ct. 2339, 2345 (1977)], the Supreme Court stated as follows:

> "Where the *major* purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." [citations omitted]

The major purpose of double jeopardy doctrine is not

to protect the integrity of the fact-finding process; instead, it is to preclude the State from harassment of an individual by repeated attempts to incarcerate him. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969); *Green v. United States*, 355 U.S. 184, 187-88 (1957). Indeed, it is fundamental to principles of double jeopardy that it is preferable that a guilty man go free than be subjected to a forbidden second prosecution.

For these reasons, a question as to the accuracy of a guilty verdict based upon legally insufficient evidence is a sound basis for ordering an acquittal upon direct appeal from such a verdict, as this Court did in *Burks* and *Greene*, and as the Texas Court of Criminal Appeals did in *Johnson v. State*, 571 S.W.2d 4 (Tex.Crim.App. 1978). In the instant cases, however, any such question has been obviated or minimized by the subsequent retrials of respondents and the presentation of additional evidence that is legally sufficient to sustain their convictions. Since it is no longer possible to prevent the second prosecution and because respondents now stand validly convicted upon legally sufficient evidence, *Burks* and *Greene* should be held prospective only in their application.

II. THE RETROACTIVITY OF *BURKS* AND *GREENE* IS A QUESTION OF NATIONAL IMPORTANCE.

A. Unless These Cases Are Held Prospective, the the Number of Prisoners Who May Receive Drastic Relief -- Outright Release -- Is Substantial, Even Though All Are Now Imprisoned As A Result Of An Otherwise Constitutionally Impregnable Conviction.

The question presented is an important one in two ways. First, as a result of the opinion below, every Texas prisoner convicted upon retrial following appellate reversal for insufficient evidence at his first trial must

be released, even though the State under applicable statutes of limitations has lost any right to retry such a prisoner on other or lesser included charges due to the passage of years or even decades. The effect of this decision upon Texas and other states simply in terms of the number of prisoners potentially entitled to release is so great that this Court's attention to the matter is warranted.

This is not a case in which the interests of only a few prisoners have been determined, nor is it a case which can be characterized as unique in the set of circumstances resulting in the invalidation of a conviction. Rather, the holding in this case requires the release of a group of prisoners who have been found guilty of diverse criminal acts, including the most serious felonies, and as to which any doubt as to the accuracy of these convictions and the factual guilt of the convicted defendants was resolved at the second trial.

Because these convictions were pursued and obtained routinely under a standard of criminal procedure which had been approved by both federal and state court decisions, including decisions of this Court, the number of such prisoners in the Texas Department of Corrections is large. There are surely far more, of course, nationally.

Second, this Court should seize this opportunity to resolve the obvious uncertainties among all the states and the federal courts as to the scope of the applicability of *Burks* and *Greene*. The virtual certainty of contradictory holdings among these jurisdictions is not an appealing one for the sound and equal administration of justice. The Court should now resolve all doubts and decide whether *Burks* and *Greene* are retroactive.

B. This Case Presents A Significant Opportunity to Diminish The Unfair Impact Of This Court's Decision In *Jackson v. Virginia.*

In *Jackson v. Virginia*, ___U.S.___, 99 S.Ct. 2781 (1979), this Court held that a federal habeas corpus petitioner may challenge the sufficiency of the evidence in his state criminal trial. The Court, as in the instant case, gave no explicit guidance as to the retroactivity of its holding. Such a retroactive application of *Jackson* would have a profoundly adverse effect upon the administration of justice, unless tempered by a holding that *Burks* and *Greene* are prospective only. Petitioner's reasoning follows.

To hold *Burks* and *Greene* prospective only would mean that in any case where the constitutional wrong -- *i.e.*, failure to grant the defendant a directed verdict of acquittal at the close of the evidence at the original trial -- occurred prior to June 14, 1978, the date of decision in *Burks* and *Greene*, retrial was permissible. The import of such a holding in relation to *Jackson v. Virginia* would be to allow retrial now of many habeas petitioners who are found to have been convicted upon insufficient evidence. Whenever the constitutional wrong as stated above occurred in such a case prior to June 14, 1978, such a retrial would be permissible.

The instant case, therefore, presents an excellent opportunity for the Court to lessen the unfair impact of an important portion of its holding in *Jackson v. Virginia.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decisions of the Texas Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

Ex parte Donald Gene MIXON.

No. 60318.

Court of Criminal Appeals of Texas,
En Banc.

Feb. 28, 1979.

Rehearing Denied July 18, 1979.

OPINION

CLINTON, Judge.

This is an application for writ of habeas corpus filed pursuant to Article 11.07, V.A.C.C.P. After a November 17, 1978 hearing on the application the trial court made and filed findings of fact and conclusions of law which, in pertinent part, not only provide the setting for our consideration of the application but also correctly suggest the legal decision and relief that must follow:

"FINDINGS OF FACT"

1. Petitioner, Donald Gene Mixon, was convicted in January of 1972 in the 69th Judicial District Court, Deaf Smith County, Texas, in Cause No. 2190 for theft of grain over the value of $50.00, and he appealed. The Court of Criminal Appeals of Texas held that the evidence was insufficient to support the conviction, therefore reversing the judgment and remanding the cause. *Mixon v. State*, Tex.Cr.App., 507 S.W.2d 238, . ..

2. In August of 1974, petitioner was tried for a second time in said Cause No. 2190, was convicted, and received a sentence of from two to seven years in the Texas Department of Corrections. Upon petitioner's appeal of this second conviction, the judgment was affirmed by the Court of Criminal Appeals in its Per Curiam opinion number 50, 175, ... (Delivered September 17, 1975 and unpublished)

3. * * *

4. As alleged by petitioner in his 'Ground # 6' his first conviction in said Cause No. 2190 was reversed and remanded upon a holding by the Court of Criminal Appeals of Texas that there was insufficient evidence to support the judgment of conviction. Petitioner was then re-tried in said Cause No. 2190, convicted, assessed a seven year prison sentence by the jury and sentenced to serve from two to seven years in the Texas Department of Corrections; and he was then unsuccessful in his appeal.

CONCLUSIONS OF LAW

In accordance with the holdings of the United States Supreme Court in *Burks vs United States* [437], U.S. [1], 98 S.Ct. 2141, 57 L.Ed.2d 1, and *Greene v. Massey* [437], U.S. [19], 98 S.Ct. 2151, 57 L.Ed.2d 15, and the Court of Criminal Appeals of Texas in *Ayers vs State*, Tex.Crim.App., 570 S.W.2d 926, the Double Jeopardy Clause of the United States Constitution precludes a second trial once the reviewing court has found the evidence legally insufficient. It appears that the relief sought by petitioner, to wit: his discharge from confinement in the Texas Department of Corrections under a conviction and sentence in said Cause No. 2190, should be granted."

The habeas court is absolutely correct and the relator is entitled to relief—if the rule of *Burks* and *Greene*, supra, is to be applied retroactively. We hold that it is.[1] Accordingly, relator is granted the relief hereinafter ordered.

[1]The Double Jeopardy Clause was held "fundamental to the American scheme of justice" and applicable to the states by *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). This Court has recognized and followed the principle that retroactive effect is given to decisions which implement "the fundamental notions of fairness embodied within the concept of due process," as in, e. g., *Ex Parte Halford*, 536 S.W.2d 230 (Tex.Crim.App. 1976). Clearly that principle is broad enough to include the "fundamental nature of the guarantee against double jeopardy," *Benton v. Maryland*, supra, 395 U.S. at 795, 89 S.Ct. at 2063.

Moreover, as explicated in *Burks*, supra, early failure to distinguish between reversals due to trial error and those resulting from evidentiary insufficiency "has contributed substantially to the present state of conceptual confusion existing in this area of the law." Pointing out that an appellate reversal for insufficiency of evidence means that the case for the prosecution was so lacking that it should not have ever been submitted to the jury and that absolute finality is accorded a verdict of acquittal, so that "it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it [has been] decided as a matter of law that the jury could not properly have returned the verdict of guilty," the Supreme Court thought it mattered not in this context that a defendant had sought a new trial as one of his remedies for, "It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." Given this rationale for the *Burks* conclusion, it "so raises *serious* questions about the accuracy of guilty verdicts in past trials," *Ivan V. v. New York*, 407 U.S. 203, 204, 92 S.Ct. 1951, 1952, 32 L.Ed.2d 659 (1972) that retroactive effect follows; see also *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 2344 (1977) holding retroactive the rule in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

It is ordered that the judgment of conviction in Cause No. 2190 in the District Court of Deaf Smith County, Texas, 222nd Judicial District is set aside and is reformed to show an acquittal and relator is discharged from confinement in the Texas Department of Corrections under the sentence in said Cause No. 2190.

OPINION ON STATE'S MOTION FOR LEAVE TO FILE MOTION FOR REHEARING

DOUGLAS, Judge, dissenting.

I dissent for the reasons stated in the dissenting opinion in *Ex parte Reynolds*, ___ S.W.2d ___ (Tex.Cr.App. 1979).

APPENDIX B

Ex parte Weldon C. DIXON.

No. 62089.

Court of Criminal Appeals of Texas,
En Banc.

July 18, 1979.

OPINION

DOUGLAS, Judge.

Dixon was convicted for the offense of aggravated robbery. His punishment was assessed at 16 years. He contends that he is entitled to relief because the first trial of his case resulted in a reversal because the evidence was held to be insufficient to support the conviction and he was convicted in the present case for the same offense. We agree.

In *Dixon v. State*, 541 S.W.2d 437 (Tex.Cr.App. 1976), the conviction was reversed because of insufficient evidence. He now attacks the second conviction because of the recent rulings of the Supreme Court of the United States in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), which held that a second trial is prohibited once a reviewing court determines that there was insufficient evidence to support the verdict.

Since those decisions were handed down, this Court has held the *Burks* and *Greene* cases to be retroactive. See *Ex parte Mixon*, 583 S.W.2d 378 (1979), and *Ex parte Reynolds*, ___ S.W.2d ___ (No. 60647, June 20, 1979).

In view of these holdings, the relief sought should be granted and this is tantamount to an acquittal.

The relief sought is granted and Dixon is ordered released from custody from his conviction in cause no. 2270 in the District Court of Hunt County.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1979

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NOS. 79-608 and 79-949

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THE STATE OF TEXAS,
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REPLY BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE
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* * *

REPLY BRIEF FOR PETITIONER

* * *

ARGUMENT

I. PETITIONER SEEKS REVIEW OF A TEXAS COURT OF CRIMINAL APPEALS DECISION BASED SOLELY UPON FEDERAL CONSTITUTIONAL GROUNDS.

Respondents Mixon and Reynolds in their briefs in opposition urge this Court to deny the petition for writ of certiorari because the Texas Court of Criminal Appeals' decision below rested on independent and adequate state grounds, even though the opinions in these cases[1] rely solely on federal constitutional grounds. Respondents make three arguments in support of their position. The first two, discussed in part A below, are

[1]Petitioner's motion to consolidate all these cases is pending.

frivolous. The third, discussed in part B below, is without merit for four reasons.

A. The Texas Court Relied only upon Federal Law in its Opinion.

1. The mere citation of a Texas case that itself relied only on federal constitutional law does not transmute the holdings in these cases to ones based on state law.

The Texas Court of Criminal Appeals has in four recent cases granted writs of habeas corpus after applying this Court's decisions in *Burks v. United States*, 437 U.S. 1 (1978); and *Greene v. Massey*, 437 U.S. 19 (1978); *Ex parte Reynolds*, 588 S.W.2d 900 (Tex.Crim. App. 1979); *Ex parte Colunga*, 587 S.W.2d 426 (Tex. Crim.App. 1979); *Ex parte Mixon*, 583 S.W.2d 378 (Tex. Crim.App. 1979); and *Ex parte Dixon*, 583 S.W.2d 793 (Tex.Crim.App. 1979).

In *all* these cases, the Texas Court of Criminal Appeals relied *solely* upon its interpretation of federal law, particularly the Fifth Amendment to the United States Constitution, and *Burks v. United States* and *Greene v. Massey*. In its *Reynolds* opinion, the Texas court neither cited a single Texas case nor referred in any manner to any provision of the Texas Constitution. The entire basis of its holding is a retroactive application of *Burks* and *Greene* -- an application here challenged as erroneous. Under *Oregon v. Hass*, 420 U.S. 714 (1975), and many other authorities, this Court has jurisdiction to review state courts' misinterpretations of federal law.

Yet respondent Reynolds argues that, in a case not even cited in her case, *Ex parte Mixon*, 583 S.W.2d 378 (Tex.Crim.App. 1979), the Texas Court of Criminal Appeals in a footnote to the opinion "indicated state law was considered." (Brief in Opposition, manuscript at 6).

Respondent Mixon of course relies also upon this footnote in the same way. (Brief in Opposition, manuscript at 5). The incredible basis upon which respondents make this assertion is that in that footnote, the Texas Court of Criminal Appeals cited, in addition to four decisions of this Court, an earlier state decision that had held *Pate v. Robinson*, 383 U.S. 375 (1966), retroactive. That state decision, *Ex parte Halford*, 536 S.W.2d 230 (Tex.Crim.App. 1976), itself cited no state law, but only interpreted the federal constitution. Thus, this case is unlike *California v. Krivda*, 409 U.S. 33 (1972), where the Court was unable to determine whether the state decision were based solely on federal grounds because of the California Supreme Court's citation of one of its prior decisions that *"relied specifically upon both the state and federal provisions."* *Id.* at 35 (emphasis added).

Respondents' apparent opinion is that any time a state court cites a state decision in an opinion construing the federal Constitution, review by this Court is barred because there is an adequate and independent state ground for granting relief. The assertion is frivolous.

2. The existence of a Texas prohibition against double jeopardy is not an independent state ground for decision, because it was not discussed, relied upon, or even cited in the Texas opinions in these cases.

Respondents correctly point out that the Texas Constitution contains an independent prohibition against double jeopardy. Tex. Const. art. 1, §14. At the same time, respondents do not dispute that the Texas Court of Criminal Appeals has never discussed, relied upon, or even cited the Texas constitutional prohibition in any of these four double jeopardy cases. Instead, respondents' meritless contention is that the *mere existence* of these possibly alternate state bases for

denial of relief -- depending upon the unknown interpretation the Texas Court of Criminal Appeals might give them -- bars review by this Court.

Numerous states have independent strictures against search and seizure, coerced confessions, double jeopardy, fair trials, and the like. If respondents were correct, then any state which had promulgated such an independent prohibition would by the mere enactment of such a statute insulate its federally-based decisions from Supreme Court review, even though the state courts themselves did not rely upon, discuss, or even cite any state basis for that decision. To state this proposition is to refute it.

B. The Texas Court of Criminal Appeals Opinion in *White v. State* Is Not an Independent and Adequate State Ground for Relief.

In *White v. State*, 521 S.W.2d 255 (Tex.Crim.App. 1974), the Texas Court of Criminal Appeals on direct appeal reversed a judgment of conviction on the ground that the police search resulting in incriminating evidence was illegal under the Fourth Amendment to the United States Constitution. The State of Texas petitioned this Court for writ of certiorari, which was granted. In *Texas v. White*, 423 U.S. 67 (1975), this Court reversed the judgment of the Texas Court of Criminal Appeals and held, on the basis of the same federal authorities misconstrued in the court below, that the search was valid. Accordingly, the decision of the Court of Criminal Appeals was reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion. 423 U.S. at 68-69.

On remand, the Court of Criminal Appeals upheld the conviction in light of this Court's holding. The Court declined to apply that portion of the Texas Constitution prohibiting unreasonable searches and seizures -- Tex. Const. art. 1, §9 -- to invalidate the search in that case.

In addition, two of the then five judges of the Court of Criminal Appeals stated in a dictum that the State of Texas should not have sought a petition for writ of certiorari in this Court in the first place. It is that dictum relied upon by respondents.

1. A majority of The Texas Court of Criminal Appeals has never endorsed the dictum quoted by respondents.

A minority of the judges of the Court of Criminal Appeals in *White v. State* quoted Tex. Const. art. 5, §26, "The State shall have no right of appeal in criminal cases," and concluded that Texas officials had violated that provision of the state constitution by seeking a petition for writ of certiorari in the case. A majority of the court refused to concur in the dictum. A majority of the Court of Criminal Appeals, in fact, has never espoused that view. The membership of the Texas Court of Criminal Appeals has since expanded to nine members. Only two of the nine have ever expressed the view, and those two have not repeated it since *White v. Texas* was decided in 1976.

2. The dictum by its own terms is inapplicable to this case, which is civil, not criminal.

The *White v. State* plurality stated that the state should not seek review by appeal or writ of certiorari from that court to this Court in any criminal case. The plurality cited several sources for its clearly articulated definition of a criminal case:

> A "criminal case" is defined to be an action, suit, or cause instituted to secure a conviction in punishment for crime, or to punish an infraction of the criminal law.

White v. State, 543 S.W.2d at 368. Clearly, *White* itself was within this definition because it was a direct appeal

from the judgment of conviction.

None of the habeas corpus applications in these cases is within the ambit of this definition. All are habeas corpus petitions. Thus, not one is a suit or cause instituted by the state to secure conviction and punishment for crime. Instead, each is a suit or cause instituted by a convicted criminal defendant to invalidate a conviction and evade punishment for crime. For that reason, the cases are civil, not criminal, under the only authoritative definition in Texas law of a "criminal case" as that term is used in Tex. Const. art. 5, §26.

3. In any event, any Texas effort to restrict the jurisdiction of this Court would be ineffective by virtue of the Supremacy Clause of the United States Constitution.

As explained above, there is no barrier in Texas law to filing the petition for writ of certiorari in this case. Even if there were, the instant writ of certiorari is authorized by 28 U.S.C. §1257(3). If state law purports to forbid an act and federal law operates to allow it, the latter controls under the Supremacy Clause of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be found thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI.

In any event, it is more than a little difficult to see how respondents' argument, even if true, would be sufficient to constitute an adequate and independent state ground for the decision in the court below as that term has been defined in *Oregon v. Hass*, 420 U.S. 714 (1975); *Duncan*

v. Tennessee, 405 U.S. 127 (1972); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965), or any other case. An independent ground for decision refers to a ground for deciding the merits of the case. Here, respondents refer to no independent basis for the decision in their cases, but only for an allegedly independent state ground precluding this Court's *review* of the merits of those cases. For the reasons above stated, the argument is without merit.

4. The Texas Court of Criminal Appeals recently refused to apply *White v. State* to these very cases.

In the paragraphs above, Petitioner has argued that a majority of the Texas Court of Criminal Appeals has never and would never disapprove the filing of the petitions for writ of certiorari in these habeas corpus cases. Recently that opinion was vindicated.

On February 8, 1980, an application for writ of prohibition and/or writ of mandamus, *Botsford v. White*, No. 7808, was filed in the Texas Court of Criminal Appeals. For substantially identical reasons to those enumerated in respondents' briefs in opposition in these cases, the application alleged that the State of Texas was without authority under Texas law to file the petitions for writ of certiorari *in these cases, Texas v. Mixon & Dixon*, No. 79-608, and *Texas v. Reynolds & Colunga*, No. 79-949. (A certified copy of the application is on file in the office of the Clerk of this Court, Hon. Michael Rodak.)

By a margin of 6-3, the Court of Criminal Appeals on February 13, 1980, refused to order the State of Texas to refrain from taking any action in furtherance of the petitions for writ of certiorari [in these cases] or to seek withdrawal of these petitions for writ of certiorari. (A certified copy of this order is on file with Mr. Rodak, and is also attached hereto as Appendix A.)

Petitioner is confident that the entire *White v. State* argument would in any event have been given short shrift by this Court. Now that the Texas courts themselves have rejected respondents' position, it is entitled to no consideration whatsoever.

II. NO RATIONAL TRIER OF FACT COULD HAVE ACQUITTED RESPONDENT REYNOLDS AT HER FIRST TRIAL.[2]

A. The Evidence Was Amply Sufficient in any Constitutional Sense.

Petitioner does not dispute that the Constitution requires proof beyond a reasonable doubt of every element of an offense. *E.g., Ivan V. v. City of New York*, 407 U.S. 203 (1972); *In re Winship*, 397 U.S. 358 (1970). But the constitutional test for determining upon collateral attack whether this burden was met at a criminal defendant's trial is established in *Jackson v. Virginia*, 443 U.S. ___, 99 S.Ct. 2781 (1979). In a habeas corpus action, the evidence at trial is constitutionally sufficient unless it is concluded that no rational trier of fact could have found guilt beyond a reasonable doubt.

The petition for writ of certiorari herein establishes that at respondent Reynolds's first trial, "her daughter's vivid, detailed account of how her mother and another man had murdered her step-father" (Petition at 13) was augmented by a large quantity of circumstantial evidence (Petition at 3-4 n.3). It is obvious that a rational trier of fact could have found respondent Reynolds guilty of every element of the offense of murder beyond a reasonable doubt.

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[2]Only respondent Reynolds has challenged the merits of Petitioner's argument that the *Burks-Greene* cases should be applied prospectively only. (Brief in Opposition, manuscript at 10-12.) Consequently, this portion of the brief is directed only at her arguments.

B. This Court Sits to Enforce the Federal Constitution, not Texas Law.

In spite of the necessity for the reversal of respondent's initial conviction for insufficient evidence to corroborate the accomplice witness testimony under Tex. Code Crim. Proc. Ann. art. 38.17 (Vernon), the Texas Court of Criminal Appeals for the reasons stated above erred in construing *Burks* and *Greene* as mandating acquittal rather than retrial. As a matter of federal constitutional law, the evidence at respondent's trial was not insufficient. Thus, to order acquittal on the basis of *Burks* and *Greene* is an erroneous application of those cases. Texas law entitled respondent to retrial rather than acquittal prior to the holdings in these Texas double jeopardy cases. All those cases erroneously interpret *Burks* and *Greene* as mandating acquittal. The error should be corrected by this Court.

III. THE RETROACTIVITY AND SCOPE OF *BURKS* AND *GREENE* ARE QUESTIONS OF NATIONAL IMPORTANCE.

A. Texas Is Not the only State Facing this Troublesome Issue.

Respondents complain that the state has not established the national importance of this legal issue. They criticize the failure of the state to set forth reliable statistical substantiation of the actual number of persons who might be affected by holding *Burks* and *Greene* retroactive. It requires no particular clairvoyance to perceive that it is likely that other jurisdictions in addition to Texas are facing the problem of proper disposition of successful habeas applications in these circumstances.

B. To Hold *Burks* and *Greene* Prospective only would Properly Allow Retrial of *Jackson v.*

Virginia Habeas Petitioners who Successfully Challenge their Convictions.

Respondents criticize the possible collateral consequence referred to by Petitioner as "beg[ging] this Court's complicity in the harassment of a second trial." (Reynolds's Brief in Opposition, manuscript at 14; Mixon's Brief in Opposition, manuscript at 10). With all due respect, Petitioner is at a loss to understand how a successful habeas petitioner under *Jackson v. Virginia* could complain of "harassment" at a second trial that he himself obtained by virtue of challenging the sufficiency of the evidence at his first trial. A habeas petitioner could avoid the emotional trauma, expense, and harassment of the second trial by the simple expedient of electing not to challenge the first trial. The choice is no different from that faced by any convicted defendant who must decide whether to appeal his conviction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decisions of the Texas Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

DAVID L. BOTSFORD, Petitioner	)( )( )(	
VS.	)(	ORIGINAL APPLICATION FOR WRIT OF PROHIBITION AND/OR WRIT OF MANDAMUS
MARK WHITE, Attorney General, Respondent	)( )( )(	

ORDER

On this 11th day of February, 1980, came to be considered by the Court of Criminal Appeals an Original Application for Writ of Prohibition and/or Writ of Mandamus presented to this Court by Petitioner, David L. Botsford. Said Application was not accompanied by a motion for leave to file same; but this Court has considered such application in the nature of a motion for leave to file and is of the opinion that said motion for leave to file said application should be denied.

Therefore, it is ORDERED, ADJUDGED and DECREED by the Court of Criminal Appeals that said application for Writ of Prohibition and/or Writ of Mandamus, considered as a motion for leave to file same, as aforesaid, be, and it is hereby, in all things denied.

It is so ordered this 13th day of February, 1980.

PER CURIAM

En Banc

Onion, P.J., Roberts, J., and Clinton, J. dissent.

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